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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN GAYE SMITH,

Defendant and Appellant.

B229724

(Los Angeles County
Super. Ct. No. YA075936)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Vincent Okamoto, Judge. Affirmed.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A.
Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and
Respondent.

Appellant Marvin Gaye Smith was convicted of being a felon in possession of a firearm and ammunition. On appeal, he contends substantial evidence did not support his intent to possess the gun or establish that it fit the statutory definition of a “firearm.” He further contends that by finding him not guilty of a similar offense -- possession of a short-barreled shotgun -- the jury returned logically inconsistent verdicts, requiring reversal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Information

In a four-count amended information, appellant Marvin Gaye Smith was charged in count one with possession of a short-barreled shotgun (Pen. Code, § 12020, subd. (a)(1))¹; in count two with possession of a firearm by a felon (§ 12021, subd. (a)(1)); in count three with possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)); and in count four with possession of ammunition by a felon (§ 12316, subd. (b)(1)).

B. Evidence at Trial

1. Prosecution Evidence

On July 1, 2009, Los Angeles County Sheriff’s deputies, Detective Tom Logrecco and Sergeant Loy Luna, were at a Federal Express location in Hawthorne monitoring parcels. Detective Logrecco was a member of the “Parcel and Cargo Narcotics Enforcement Team” or “PACNET,” whose assignment was to search for drugs or drug money being shipped through package delivery services such as Federal Express and the United Postal Service. A suspicious package containing

¹ Undesignated statutory references are to the Penal Code.

appellant's name and the address 2929 West 78th Street came to Detective Logrecco's attention.²

Detective Logrecco confiscated the package, and along with Sergeant Luna and other deputies and PACNET team members, took it to the address on the label.³ Dressed as a Federal Express employee, Detective Logrecco approached appellant, who was standing between the main house and a smaller back house located at that address, and asked him if he was Marvin Smith and if he was expecting a package. Appellant answered "yes" to both questions. At that point, the deputies identified themselves and appellant agreed to talk to them inside the back house, a studio with a separate bathroom. Appellant led the deputies into the house. He denied having any weapons or being on probation or parole.

During discussions inside the house, appellant asked for his cell phone. Detective Logrecco handed him a phone and wallet lying on a desk; appellant said he wanted the phone on the bed. Detective Logrecco did not see a phone until, at appellant's suggestion, he moved the covers and spotted a phone next to two live shotgun rounds.⁴ Appellant then admitted there was a shotgun on the bed under the pillow. Appellant said he had found the shotgun a few days earlier on a curb

² Deputy Logrecco identified the package as suspicious because the airbill was handwritten, there were no telephone numbers for the sender or recipient, the sender paid in cash, it was shipped with overnight delivery instructions, and it came from Tennessee, a state where drugs are often shipped by parcel delivery.

³ When the the Federal Express package was searched, the deputies found two magazines containing \$2,760 in 20 dollar bills between the pages.

⁴ Deputy Logrecco stated the rounds were "fixed shotgun shell[s]," which he described as having primer, powder and pellets in one cartridge. He stated that when the primer at the bottom of the cartridge was struck, the powder provided the force needed to shoot the pellets out. The shells were put into evidence.

by a nearby house. Asked why he had denied having a weapon, appellant said he thought the deputies were referring to handguns.

After the detective found the shotgun, appellant signed a “Search and Entry Waiver” form, attesting that appellant had “legal custody and control” over the premises located at 2929 West 78th Street. The deputies searched and uncovered a number of items in the house, including four boxes of live shotgun shells, an empty prescription bottle in appellant’s name, a completed prescription form containing appellant’s name, a daily planner containing appointments and doctor’s appointment cards under appellant’s name, and a money gram receipt in his name.⁵

Appellant denied dealing prescription drugs, but stated that he had a friend, a frequent visitor whose name he would not provide, who did. Appellant denied that the friend lived at the house, stating that he lived alone.

The shotgun was shown to the jury and entered into evidence. Detective Logrecco testified that he was familiar with shotguns because he used them to shoot skeet and traps. According to his testimony, the shotgun found in the house utilized a pump action and had a pistol grip. The barrel had been shortened after manufacture or “sawed off.” The barrel measured 15.25 inches when the shotgun was assembled. When the shotgun was disassembled, the barrel measured 17 inches.⁶ Detective Logrecco ascertained that the shotgun was in working order by dry-firing it. He heard and felt the firing pin click. He further ascertained that the pump action, which ejects a spent shell and loads a new one, was working. He stated that the shotgun was capable of firing the rounds found in the house.

⁵ Appellant initially admitted and then denied the planner was his.

⁶ A short-barreled shotgun is statutorily defined to include “a firearm that is designed or redesigned to fire a fixed shotgun shell and has a barrel or barrels of less than 18 inches in length.” (§ 17180, sub. (a).)

Detective Logrecco expressed the opinion that the shotgun was likely used for “protection” rather than hunting or sport because the pistol grip meant it could not be held along the cheek for purposes of aiming and the shortened barrel meant the shot would expand before reaching a clay pigeon or hunted animal.

The prosecution presented evidence that appellant had sustained prior felony convictions for robbery and fraud.

2. Defense Case

Calvin Turner testified that he had lived at 2929 West 78th Street earlier in the year, from March to May 2009. He stored his belongings there for a month or two afterward. Among the stored items was property he inherited from his deceased mother and grandfather, which included the shotgun. He stated that he left the shotgun wrapped up in clothing under the pillow on the bed.⁷

Michael Daniels, the owner of the property located at 2929 West 78th Street, testified that he had been renting the back house to appellant for some time, and that after the main house burned in 2009, he agreed to allow appellant to sublet the back house. Daniels did not spend much time at the property, but would occasionally see the sublettor, whom he did not identify. Daniels believed appellant lived nearby with his girlfriend.

C. The Verdict and Sentence

The jury found appellant guilty of possession of a firearm and possession of ammunition and not guilty of the other two offenses. The jury found true that

⁷ Asked on cross-examination, Turner was unable to describe the shotgun other than its pistol grip.

appellant had suffered a prior conviction of a serious or violent felony. Appellant was sentenced to a total term of four years and eight months.

DISCUSSION

Appellant contends the evidence presented at trial was insufficient to support his conviction of count two, possession of a firearm in violation of former section 12021, subdivision (a)(1).⁸ In this regard, appellant first contends the prosecution did not present sufficient evidence that he had knowledge of the gun's presence in light of the defense evidence that someone other than appellant had lived in the house or stored belongings there. Appellant further contends that the prosecution failed to establish that the shotgun fit the statutory definition of a "firearm." Appellant additionally contends the "not guilty" verdict on count one, charging possession of a short-barreled shotgun, indicates a logically inconsistent verdict and juror confusion and requires reversal of the guilty verdict on count two. We find that substantial evidence supported the verdict and that the jury's verdict was not inconsistent.

A. Knowledge Element

"Any person who has been convicted of a felony . . . and who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony." (§ 29800, subd. (a)(1) [formerly section 12021, subd. (a)(1)].) "The elements of the offense proscribed by [former] section 12021 are conviction of a felony and ownership, possession, custody or control of

⁸ Appellant was charged in count two under former section 12021, subdivision (a)(1), which has been recodified, effective January 1, 2012, as section 29800, subdivision (a)(1), with no substantive changes.

a firearm.” (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) “‘Knowledge is also an element of the offense. [Citation.]’” (*People v. Kim* (2011) 193 Cal.App.4th 836, 846.) “Implicit in the crime of possession of a firearm is that a person is aware both that the item is in his or her possession and that it is a firearm.” (*Ibid.*) Accordingly, “‘a felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent.’ [Citation.]” (*Ibid.*)

To support his contention that no evidence supported his knowledge of the presence of the shotgun inside the house or his intent to possess or control it, appellant relies exclusively on the defense evidence indicating that appellant sublet the house to Turner, who claimed ownership of the shotgun and testified to having placed it under the pillow on the bed. However, appellant’s own statements to the deputies provided substantial evidence to support that he possessed and/or exercised control over the shotgun. After the deputies spotted the shells on the bed, appellant told them the shotgun was under the pillow. When the deputies found the shotgun, appellant admitted bringing it into the house, claiming to have found it on a curb by a nearby house. When asked why he had not admitted to having a weapon when the deputies first inquired, he did not deny knowing of the gun, but claimed not to have considered it the type of weapon to which the deputies were referring. Moreover, there was more than sufficient evidence to undermine the credibility of the defense’s witnesses with respect to who was residing in the house. A Federal Express package containing a substantial sum of money was addressed to appellant at 2929 West 78th Street, providing circumstantial evidence that he told the sender he lived there. Appellant was first observed standing outside the house and admitted he was waiting for delivery of

the package. He led the deputies into the house without suggesting he did not live there or that he had no right to be inside it. His wallet and two cell phones were found inside the house, along with a number of items containing his name, including a day planner, receipts and a prescription. Appellant subsequently signed a “Search and Entry Waiver” form, affirming that appellant had “legal custody and control” over the premises. Appellant told the deputies he lived alone. In short, both the circumstantial evidence and appellant’s own admissions provided substantial evidence of his possession of and control over the firearm and the house where it was found.

B. “*Firearm*” Element

A ““firearm”” is statutorily defined as ““any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion.”” (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435, quoting [former] § 12001, subd. (b) [now § 16520, subd. (a).] “[T]oy guns obviously do not qualify as a ‘firearm,’ nor do pellet guns or BB guns because, instead of explosion or other combustion, they use the force of air pressure, gas pressure, or spring action to expel a projectile.” (*People v. Monjaras*, *supra*, at p. 1435.)

Appellant contends the evidence did not establish that the recovered shotgun used an explosion or other form of combustion to propel the shells and suggests that it might have used air. Appellant overlooks that Detective Logrecco testified that the rounds recovered from the house were fixed shotgun shells, which, he went on to explain, meant that they contained primer and powder that, when struck, provided the force needed to expel the pellets. He further testified that the shells

found in the house fit the shotgun.⁹ Later, when testifying concerning the purpose of that type of shotgun, he expressed the opinion that it was used for “protection,” indicating that the force of the shotgun would be sufficient to stop an adversary, something that would not have been true of a BB gun. This evidence was sufficient to establish that the shotgun at issue used an explosion or combustion to expel projectiles and therefore fit the statutory definition of firearm.

C. “*Inconsistent*” Verdicts

The jury found appellant guilty of possession of a firearm, but not guilty of possession of a short-barreled shotgun. Appellant contends that the elements of both were sufficiently similar that the verdicts were logically inconsistent.

We note initially that, “a jury may make inconsistent findings or verdicts as to a defendant charged with two offenses. An acquittal on one offense will not invalidate a verdict on a second offense, although the two verdicts are factually inconsistent.” (*People v. Pettaway* (1988) 206 Cal.App.3d 1312, 1324.) “This rule is based on the realization that inconsistent findings may be caused simply by the mercy or leniency of the jury.” (*Id.* at p. 1324; accord, *People v. Lopez* (1982) 131 Cal.App.3d 565, 571.)

Here, moreover, the verdicts were not inconsistent. To prove appellant guilty of possession of a short-barreled shotgun, the prosecution was required to prove appellant’s knowledge of the gun’s illegal characteristic, “namely, its shortness.” (*People v. King* (2006) 38 Cal.4th 617, 628.) The jury was instructed that the elements of the offense included that appellant “knew that he possessed the short[-]barreled shotgun” and that appellant “knew that the object was a short[-]

⁹ We note that both the shells and the shotgun were placed into evidence for the jurors to examine.

lbarreled shotgun.” Detective Logrecco testified that when disassembled, the barrel of the gun was 17 inches, only one inch less than the legal length. The jury could reasonably have concluded that appellant was not aware of the gun’s illegal length. In short, there was no inconsistency in the jury’s verdict.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.